

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALEXANDER KOSNICKI,

Defendant.

CASE NO: 2:23-CR-0003-TOR

ORDER DENYING MOTION TO  
DISMISS COUNT ONE

BEFORE THE COURT is Defendant's Motion to Dismiss Count One. ECF No. 73. The motion was submitted for hearing without oral argument. The Court has reviewed the record and the files herein, the completed briefing, and is fully informed.

On April 4, 2023, Defendant was charged in a Superseding Indictment with two crimes; Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(8); and Possession with Intent to Distribute Fentanyl in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). ECF No. 40. Defendant has now filed a motion to dismiss count 1, the felon in possession of a firearm charge.

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1 Defendant contends that in 2022, “the Supreme Court rewrote the  
2 framework for analyzing Second Amendment challenges. It rejected the test lower  
3 courts had used to analyze firearm regulations, replacing it with a two-step  
4 approach where courts must examine whether a challenged law ‘is consistent with  
5 the Nation’s historical tradition of firearm regulation.’ *N.Y.S. Rifle & Pistol Ass’n*  
6 *v. Bruen*, 142 S. Ct. 2111, 2130 (2022).” ECF No 73 at 4-5. Defendant brings an  
7 as-applied Second Amendment challenge to § 922(g)(1), requesting the Court  
8 dismiss Count One of the Superseding Indictment.

9 The United States opposes Defendant’s motion and contends that nothing in  
10 *N.Y.S. Rifle & Pistol Ass’n v. Bruen* warrants dismissal of Count One.

### 11 DISCUSSION

12 Rule 12(b)(1) of the Federal Rules of Criminal Procedure allows for a  
13 challenge to the indictment by a pretrial motion that the “court can determine  
14 without a trial on the merits.” Rule 12 permits pretrial resolution of a motion to  
15 dismiss the indictment only when “trial of facts surrounding the commission of the  
16 alleged offense would be of no assistance in determining the validity of the  
17 defense.” *United States v. Covington*, 395 U.S. 57, 60 (1969). Because the  
18 relevant facts are not in dispute, this issue may be resolved as a matter of law  
19 through a pretrial motion.  
20

1 Defendant's as-applied Second Amendment challenge to § 922(g)(1) is  
2 based on two reasons. First, Defendant contends that he remains part of "the  
3 people" protected by the Second Amendment despite his prior felony conviction.  
4 ECF No. 73 at 5. He argues that felons retain their rights as part of "the people"  
5 under the other Bill of Rights provisions using that term of art, they remain part of  
6 "the people" under the Second Amendment as well. *Id.* Second, Defendant  
7 contends the government cannot carry its burden under *Bruen*'s second step to  
8 show that § 922(g)(1) is "consistent with the Nation's historical tradition of firearm  
9 regulation." *Id.*

10 Defendant has quoted and misinterpreted the Supreme Court's opinions  
11 without citing to all the relevant language used. First, in *Bruen* the Supreme Court  
12 granted certiorari to decide whether New York's denial of petitioners' license  
13 applications violated the Constitution. *Bruen*, 142 S. Ct. at 2125. Petitioners in  
14 *Bruen* are "law abiding, adult citizens of Rensselaer County, New York . . ." *Id.* at  
15 2124-25. In the Supreme Court's opinion, the Court repeatedly said that the  
16 Second and Fourteenth Amendments protect the right of an ordinary, law-abiding  
17 citizen to possess a handgun. *Id.* at 2122, 2131, 2133, 2134, and 2138 (to name a  
18 few). Defendant overlooks this critical language used by the Supreme Court.  
19 *Bruen* also reaffirmed its holding that "like most rights, the right secured by the  
20 Second Amendment is not unlimited." *Bruen*, 142 S. Ct. at 2128 (citing *District of*

1 *Columbia v. Heller*, 554 U.S. 550, 626 (2008)). In *Heller*, the Supreme Court said  
2 “nothing in our opinion should be taken to cast doubt on longstanding prohibitions  
3 on the possession of firearms by felons and the mentally ill, or laws forbidding the  
4 carrying of firearms in sensitive places such as schools and government buildings .  
5 . . .” *Heller*, 554 U.S. at 626.

6 Thus, Defendant’s argument that he remains part of “the people” under the  
7 Second Amendment has plainly been rejected by the Supreme Court as he is a  
8 convicted felon that can no longer possess a firearm.

9 Defendant’s second argument suffers from similar infirmities as the first.  
10 Defendant has ignored critical language used by the Supreme Court. Felons and  
11 the mentally ill cannot possess firearms. The Supreme Court addressed this issue  
12 in *Heller* and which was reaffirmed and cited to in *Bruen*;

13 There seems to us no doubt, on the basis of both text and  
14 history, that the Second Amendment conferred an individual  
15 right to keep and bear arms. Of course the right was not  
16 unlimited, just as the First Amendment’s right of free speech  
17 was not, *see, e.g., United States v. Williams*, 553 U.S. 285, 128  
18 S. Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, we do not read  
the Second Amendment to protect the right of citizens to carry  
arms for *any sort* of confrontation, just as we do not read the  
First Amendment to protect the right of citizens to speak for  
*any purpose*.

19 *Heller*, 554 U.S. at 595. In *Heller*, the Supreme Court affirmed the  
20 constitutionality of “longstanding prohibitions on the possession of firearms by

1 felons” and others. 554 U.S. at 626–27. The Supreme Court did not hold  
2 otherwise in *Bruen*, but rather invoked *Heller* in stating the Second Amendment  
3 protects the rights of “law-abiding, responsible citizens” to carry arms. *Bruen*, 142  
4 S. Ct. at 2138 n.9. Moreover, the Ninth Circuit in *Vongxay* relied on *Heller*’s  
5 statements that “longstanding prohibitions on the possession of firearms by felons”  
6 are “presumptively lawful.” *United States v. Vongxay*, 594 F.3d 1111, 1115, 1118  
7 9th Cir. 2010).

8 To the extent a historical analysis is warranted, for hundreds of years the  
9 disaffected and dangerous could not possess firearms. Controlling Ninth Circuit  
10 and Supreme Court precedent directs this conclusion.

11 **THEREFORE, IT IS HEREBY ORDERED:**

- 12 1. Defendant's Motion to Dismiss Count One, ECF No. 73, is **DENIED**.  
13 2. The hearing on this motion is cancelled.

14 The District Court Executive is directed to enter this order and provide  
15 copies to counsel.

16 DATED November 28, 2023.



20  
THOMAS O. RICE  
United States District Judge